Supreme Court, U.S.
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No. 79-665

In the Supreme Court of the United States

OCTOBER TERM, 1979

JAMES L. PICKERING, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner seeks review of the decision below in this federal income tax case disallowing in part a claimed casualty loss deduction.[1]

The pertinent facts are undisputed and may be summarized as follows: On his income tax return for 1973, petitioner claimed a casualty loss deduction of $4,000 based on damage from vandalism during that year to certain rental property then owned by him (Pet. 14-15). On audit, the Commissioner of Internal Revenue disallowed the loss, asserting that petitioner had failed to establish the facts necessary to support the

[1]Although petitioner filed a "notice of appeal" in the court of appeals and a "Jurisdictional Statement" in this Court, he has not suggested any basis for invoking the appellate jurisdiction of this Court. Pursuant to 28 U.S.C. 2103, we therefore treat the Jurisdictional Statement as a Petition for a Writ of Certiorari.

claimed deduction (Pet. 16). In this suit brought by petitioner in the Tax Court for redetermination of the resulting deficiency, the Tax Court found that petitioner had failed to demonstrate the amount of his loss by either of the two methods sanctioned in the applicable Treasury Regulations. Specifically, the Tax Court ruled that petitioner had not substantiated the loss by repairing the damage and showing the cost of such repairs, and had failed to demonstrate the decline in the value of the property resulting from the casualty. See Treasury Regulations on Income Tax (1954 Code), 26 C.F.R. 1.165-7(a)(2). Nevertheless, the Tax Court approximated the amount of the loss pursuant to the rule of *Cohan* v. *Commissioner*, 39 F. 2d 540, 544 (2d Cir. 1930), and allowed petitioner a casualty loss deduction of $1,750 (Pet. 18-19). The court of appeals affirmed (Pet. 7-8).

1. Petitioner challenges (Pet. 2, 4) the constitutionality of Section 7453 of the Internal Revenue Code of 1954 (26 U.S.C.), which provides that Tax Court proceedings are to be conducted "in accordance with the rules of evidence applicable in trials without a jury in the United States District Court of the District of Columbia." Petitioner's attack appears to be directed to the Tax Court's denial of his request for a jury trial (Pet. 22). It is, however, settled beyond question that a taxpayer is not entitled to a jury trial in the Tax Court. *Phillips* v. *Commissioner*, 283 U.S. 589, 599 n.9 (1931); *Dahl* v. *Commissioner*, 526 F. 2d 552 (9th Cir. 1975); *Dorl* v. *Commissioner*, 507 F. 2d 406, 407 (2d Cir. 1974); *Olshausen* v. *Commissioner*, 273 F. 2d 23, 28 (9th Cir. 1959), cert. denied, 363 U.S. 820 (1960).

2. The various constitutional provisions cited by petitioner (Pet. 3-4) do not bear upon the question whether the Tax Court correctly imposed on him the burden of establishing his entitlement to the claimed

deduction. See *Welch* v. *Helvering*, 290 U.S. 111, 115 (1933). Given petitioner's failure to establish the actual diminution in value of his property resulting from vandalism during the year in question, the Tax Court properly limited his deduction to the amount it estimated as his actual loss pursuant to the rule of *Cohan* v. *Commissioner*, *supra*.[2] The courts below were more than fair in allowing petitioner a deduction for the approximated casualty loss of $1,750.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1979

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[2]In *Cohan*, the court held that where the Tax Court is persuaded that the taxpayer is entitled to a deduction even though he has failed to establish the precise amount, it may allow an estimated amount, "bearing heavily if it chooses upon the taxpayer whose inexactitude is of its own making." *Cohan* v. *Commissioner*, *supra*, 39 F. 2d at 544. *Warren Service Corp.* v. *Commissioner*, 110 F. 2d 723 (2d Cir. 1940), upon which petitioner relies (Pet. 1-4), is inapposite. That case stands only for the well-established proposition that, in the absence of a sale or exchange, the mere diminution in the value of property resulting from economic factors does not give rise to a deductible loss. In the case of a casualty loss where the damage is not repaired, it is the diminution of value (limited, of course, to the amount of the adjusted basis of the property) that constitutes the proper measure of the loss. See *Rosenthal* v. *Commissioner*, 416 F. 2d 491 (2d Cir. 1969).

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